Ky. OAG 02-1, 2002 WL 597401 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

OAG 02-1

February 7, 2002

Subject: Municipal utilities: extension outside city limits and regulation by the Public Service Commission and fiscal courts
:*Syllabus:* Absent statutory authority, a city may not extend its facilities to provide extra-territorial service, however, city-owned utilities may allow non-resident access to surplus utilities.
Statutes construed: KRS 67.083, KRS 96.150, KRS 96.190, KRS 96.265, KRS 96.542, KRS 278.010 and 278.020
OAGs cited: OAG 79-346

R.T. Daniel
Johnson County Judge Executive

Opinion of the Attorney General

We have been asked by the Johnson County Judge Executive, R. T. Daniel, several questions relating to the operation of a city owned gas utility. It is well accepted that a city may extend its water system and furnish and sell water to customers beyond the city's corporate limits. This power is expressly granted by the legislature and is codified in KRS 96.150 and KRS 96.265. KRS 96.542 expressly permits cities to extend **artificial** gas systems beyond the city limits; however, this statute does not include a grant of authority to furnish and sell artificial gas beyond the corporate limits. Chapter 96 does not expressly mention natural gas or other utilities besides water and artificial gas as being able to be distributed by cities, outside city boundaries.

The statutory authority relating to water service has not always been present. Under a predecessor to the current version of KRS 96.150, there was no authority to extend service. Several cases from this period hold that a city may not extend its facilities in order to provide for extra-territorial service. The city may sell surplus, but it may not extend facilities. For example, in *Dyer v. City of Newport*, 123 Ky. 203, 94 S.W. 25 (1906), the court makes the following statement:

> In *Henderson v. Young*, 83 S.W. 583, 26 Ky. Law Rep. 1152, and *Rogers v. City of Wickliffe* (decided last week) 94 S.W. 24, 29 Ky. Law Rep., we held that where a municipality owns and operates its own electric light plant, or its own waterworks, it may legally sell any excess of its product to outsiders. We adhere to that opinion. But in each of these cases the outside purchasers took the product from the plant as constructed and operated by the city, and the latter was not bound or permitted to extend its facilities beyond the corporate limits in order to accommodate such purchasers. If Clifton had constructed, or a private concern had constructed a plant of mains, pipes, etc., in Clifton to supply its citizens with water, Newport might lawfully sell them any of its surplus water from its plant.

The court's holding from this line of cases is clear. Absent statutory authority, a city may not extend its facilities to provide extra-territorial service.

A city may not rely upon these provisions relating to water service or artificial gas as a basis to also conclude that it may construct additional facilities and works to provide natural gas service to non-residents. To the extent there is a surplus of natural gas, the city may lawfully allow non-residents the opportunity to access the surplus. This access must be consistent with the rules set forth in common law, as outlined above. In addition, the power under the common law framework is not as broad as the power under KRS 96.150. Also, it is important to remember that the permission given to a city in KRS 96.190 to maintain utility facilities outside the city boundaries does not give express authority for distribution of utilities by cities to non-residents. As a result, unless authority is specifically given by statute to a specific utility type (such as water or artificial gas), common law holds that city-owned utilities may only sell surplus utilities to non-residents and thus may not distribute those utilities through additional city-owned facilities dedicated to non-resident customers.

***2** We turn next to the issue on PSC regulation of city owned utilities. Municipally owned utilities are generally excluded from regulation by the Public Service Commission (PSC), except for 1) initial approval when a municipality commences service or acquires control of a utility or 2) when a city contracts with a PSC-regulated entity to provide utilities.

KRS 278.010 (3) is clear that municipalities are excluded from the jurisdiction of the Public Service Commission:

> (3) "Utility" means any person **except**, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, **a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:**
> (a) **The generation, production, transmission, or distribution of electricity** to or for the public, for compensation, for lights, heat, power, or other uses;

(b) **The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas**, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses;

(c) **The transporting or conveying of gas, crude oil, or other fluid substance** by pipeline to or for the public, for compensation;

(d) **The diverting, developing, pumping, impounding, distributing, or furnishing of water** to or for the public, for compensation;

(e) The transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation; or

(f) **The collection, transmission, or treatment of sewage** for the public, for compensation, if the facility is a subdivision collection, transmission, or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220.
KRS 278. 010 (3) (emphasis added).

In addition, Kentucky case law holds that cities are exempt from Public Service Commission regulation and jur-

isdiction regardless of whether the city operates utilities inside or outside the city limit boundaries. *McClellan v. Louisville Water Company*, Ky., 351 S.W. 2d 197 (1961). The exemption extends to KRS 278.020(1). A city is not required to seek a certificate for new construction. *City of Flemingsburg v. Public Service Commission*, Ky., 411 S.W. 2d 920 (1966).

Cities do not, however, have complete immunity from Public Service Commission regulation. KRS 278.020(5) makes clear that **any person** seeking to purchase or control a utility must first acquire approval from the Public Service Commission. Therefore, a city seeking control of a utility must request approval under this provision. KRS 278.020(5) states in part:

> **No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity** (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, **without having first obtained the approval of the commission** (emphasis added).

***3** In addition, KRS 278.010 (2) broadly and without limit defines "person" as including "natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest." Case law has held, however, that a city is not a "person" for the purposes of bringing municipalities under Public Service Commission jurisdiction when expanding utilities beyond the city boundaries. *City of Georgetown v. Public Service Commission*, Ky. App., 516 S.W.2d 842 (1974). Thus, the Public Service Commission does not necessarily have to approve entrance by a city into an adjacent territory, but when a city contracts with a utility subject to PSC regulation, this exemption is waived.

Notwithstanding *City of Georgetown*, KRS 278.020, as it now reads, broadens the definition of which entities require approval for acquiring or controlling a utility. No utility, whether privately held or city owned, is exempt from initial approval from the Public Service Commission. This can be read to include cities, without the debate over whether the city is a "person" for purposes of PSC regulation of utility acquisitions. In a more recent decision, the Kentucky Supreme Court held that when a city contracts with another utility, the city loses its exemption from PSC regulation for that transaction. *Simpson County Water District v. City of Franklin*, Ky., 872 S.W.2d 460 (1994). Also, KRS 96.190(1) provides that the provision of telecommunications service by a city of the fourth class is subject to the regulation of the Public Service Commission. Therefore, cities seeking to contract with a utility to provide a service will cause that particular transaction to fall within PSC jurisdiction.

Kentucky statutes are clear that the Public Service Commission must approve a purchase, control or acquisition of a utility by a municipality. However, the statute also states that city owned utilities do not fall under the traditional regulatory jurisdiction of the PSC. As a result, most municipal utility operations fall outside the regulatory powers of the PSC, unless the city contracts with a PSC-regulated entity.

The last issue we address is the ability of fiscal courts to regulate municipal utilities. We conclude for the reasons that follow, that fiscal courts are limited in their oversight and regulation of municipally owned utilities.

In 1979, we issued an opinion which held that fiscal courts had the authority to regulate utilities in so far as they entered onto and potentially conflicted with public rights of way controlled by the county. We said, A...the right of the fiscal court to reasonably supervise and control such county public ways generally, and as affecting occupying utilities remains." OAG 79-346. The opinion stated that while some regulation of how utilities are to be constructed along rights of way is proper by fiscal courts, the "enfranchisement" of certain utilities by counties is reserved to the Commonwealth.

Currently, Kentucky statutes make clear what powers the fiscal court has in regulating utilities. KRS 67.083 states (emphasis added):

***4** ...

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, **the fiscal court of any county may enact ordinances, issue regulations**, levy taxes, issue bonds, appropriate funds, and employ personnel **in performance of the following public functions:**

...

(r) Provision of **water and sewage** and garbage disposal service **but not gas or electricity**; including management of onsite sewage disposal systems;

(s) Licensing or franchising of **cable television**;...

Therefore, it is clear that fiscal courts may generally regulate water, sewer and cable television services in the county, but are restricted from governing the use of gas or electricity. As stated in the opinion above, this type of regulation by fiscal courts often involves a utility's use of county right-of-way and public access. Of course, most utilities, other than municipal utilities, still fall under the main regulatory jurisdiction of the Public Service Commission.

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